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No. 91-1437

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

BROADCAST MUSIC, INC., *et al.*,

Petitioners,

v.

CLAIRE'S BOUTIQUES, INC.,
d/b/a CLAIRE'S BOUTIQUES,
and d/b/a ARCADIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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*There have been no changes in the parties to the proceedings listed on pages ii-v of Broadcast Music, Inc.'s Petition.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Despite Claire's efforts to the contrary, its brief highlights the reasons why a writ of certiorari should be granted. The need for this Court to resolve the three-fold conflict—among the circuits, with Congressional intent, and with the plain language of the statute—is clear.

I. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE "SINGLE RECEIVING APPARATUS" REQUIREMENT CONFLICTS WITH PRECEDENT, CONGRESSIONAL INTENT, AND THE STATUTORY LANGUAGE.

Petitioners do not argue, as asserted by Claire's, that "mere ownership of multiple *retail establishments* preclude[s] application of the Section 110(5) exemption." Claire's Brief at 6 (emphasis added). Rather, Petitioners assert, and precedent, Congressional intent, and the statutory language confirm, that ownership of 669 *receiving apparatuses* by a multimillion dollar chain store operation precludes application of the Section 110(5) exemption.

A. Precedent Mandates That Claire's Activities Must Be Examined As a Whole.

The Seventh Circuit (and later the Eighth Circuit in *Edison Brothers* for which a simultaneous petition for a writ of certiorari is pending with this Court) held that the analysis of whether the Section 110(5) exemption applies "should be limited to the area where a single work is performed" (App. 14a) rather than by focusing upon the infringer's activities as a whole. But every prior decision, including those of both the Second and the Ninth Circuits, has interpreted the Section 110(5) exemption to apply to the activities of an alleged infringer as a whole, not to each location or receiver in isolation.

In *Sailor Music v. The Gap Stores, Inc.*, 516 F. Supp. 923, 925 (S.D.N.Y. 1981), *aff'd per curiam*, 668 F.2d 84, 85-86 (2d

Cir. 1981), *cert. denied*, 456 U.S. 945 (1982), the Second Circuit affirmed the district court's approach in analyzing The Gap's entire chain store operation, even though specific infringements were alleged to have occurred at only two stores. Similarly, the Ninth Circuit held that the "size and nature" of the Casual Corner chain precluded the application of the Section 110(5) exemption to every store in that chain, even though the alleged infringements occurred in only three stores. Indeed, the Ninth Circuit affirmed the district court's injunction against *all* Casual Corner stores. *Broadcast Music, Inc. v. United States Shoe Corp.*, 211 U.S.P.Q. 43 (C.D. Cal. 1980), *aff'd*, 678 F.2d 816, 817 (9th Cir. 1982).

Every prior district court decision also examined an infringer's activities as a whole, *i.e.*, its use of music throughout a chain operation, where the alleged infringements occurred at only a few stores of a larger chain. None of the judges in these cases looked at individual stores in isolation. *See Merrill v. Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. 1172 (W.D. Tex. 1988); *Lamminations Music v. P & X Markets, Inc.*, 1985 Copyright L. Dec. (CCH) ¶ 25,790 (N.D. Cal. 1985); *Rodgers v. Eighty Four Lumber Co.*, 617 F. Supp. 1021 (W.D. Pa. 1985); *see also* BMI's Petition at 9 for a discussion of these cases.

Thus, the Seventh Circuit's decision conflicts with every prior circuit and district court decision which examined whether an infringer's entire scope of activities surrounding the use of copyrighted music must be analyzed in the aggregate, instead of piecemeal, in order to correctly determine if the infringer was entitled to the Section 110(5) exemption.

It is the Seventh Circuit, not Petitioners, that devised a novel definition of "a single receiving apparatus." Claire's Brief at 6-7. "Single" has only one definition; it means "one." The conclusion that each receiving apparatus should be examined separately to determine if it satisfies the "single receiving apparatus" test would mean that every receiving apparatus *automatically* meets the test. Therefore, "single" means single *per user*, not per location. The Sev-

enth Circuit's ruling that "the 'single receiving apparatus' test applies to each retail operation and not to its owner" (Claire's Brief at 8) is contrary to the statutory language and every other interpretation of Section 110(5).[1]

B. The Seventh Circuit Has Written A New Test Into The Statute.

The Seventh Circuit's "broadcaster" test conflicts with the plain meaning of the statute. It is Claire's that makes a "tortured" reading of the Seventh Circuit's decision to argue that the Seventh Circuit has not imposed a new test. Claire's Brief at 7-8. The Seventh Circuit expressly held that "unless Claire's acted like a broadcaster, the analysis must be limited to the single business site where the receiving apparatus operates." App. 15a n.10. No basis exists in the statute, legislative history, or precedent, for the conclusion that Claire's activities should be considered as a whole only if the copyright owners demonstrated that Claire's acted like a broadcaster. The Seventh Circuit's newly created "broadcaster" test conflicts with the express language of the statute, precedent, and Congressional intent. The Seventh Circuit's decision permits unlicensed use of copyrighted music to an extreme that neither any prior court nor Congress found warranted.

II. THE SEVENTH CIRCUIT'S REJECTION OF THE "SMALL BUSINESS" AND "COMMERCIAL BACKGROUND MUSIC SERVICE" TESTS CONFLICTS WITH EVERY PRIOR DECISION AND CONGRESSIONAL INTENT.

Claire's dismisses the "small business" and "commercial background music service" tests as if there is no basis for

[1]While prior courts had not squarely addressed the definition of single receiver, but rather had looked to the size of the defendants' business as a whole, none of these courts, in the 13 years between the effective date of the 1976 Copyright Act and the *Claire's* decision, had extended the Section 110(5) exemption to any person or company operating more than one unlicensed receiver.

these tests. *See* Claire's Brief at 9-12. In fact, every prior decision confirms, and even the Seventh Circuit itself admits, that Congress intended to limit the exemption to small businesses. The legislative history, which this Court has found to be important in numerous other interpretations of the Copyright Act, indisputably expresses Congress' intent to preclude multimillion dollar chain store operations, like Claire's, from the Section 110(5) exemption. *See* BMI's Petition at 10-12.

Numerous cases have relied on the small business and commerical background music service tests in determining the applicability of Section 110(5). *See* BMI's Petition at 10-12 and the cases cited in n.5.[2] These tests are not simply "policy issues." Every prior decision relied on them because of Congress' express intent that Section 110(5) exempt only small businesses. Neither Claire's nor the Seventh Circuit dispute this intent. Ironically, it is only now, after Claire's has succeeded in the district and circuit courts, that Claire's rejects these tests as improper use of legislative history. Indeed, Claire's admits that in its memorandum in support of its motion for summary judgment, it relied heavily upon these tests as proof that Claire's did satisfy the requirements of the Section 110(5) exemption. *See* Claire's Brief at 3.

Moreover, precedent have consistently held that these tests constitute independent grounds for determining the applicability of Section 110(5). *See* BMI's Petition at 11 and the cases cited in n.5. An alleged infringer must be a small business for the Section 110(5) to apply, regardless of the type of receiving apparatus it uses. Rejection of these independent grounds constitutes an irreconcilable conflict with other circuit and district courts that can only be resolved by this Court.

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[2]BMI does not place, as Claire's asserts, "undue reliance" on *Bill Miller's Bar-B-Q*. Claire's Brief at 11. Indeed, that case just represents one decision in a long line of precedent attesting to the importance of the small business and commercial background music service tests. It is not an anomaly. *See* BMI's Petition at 11-12 n.5.

III. THE SEVENTH CIRCUIT'S DEFINITION OF FURTHER TRANSMISSION CONFLICTS WITH AN UNBROKEN LINE OF PRECEDENT, CONGRESSIONAL INTENT, AND THE STATUTORY LANGUAGE.

The definition of "further transmission" that Claire's criticizes as "BMI's definition" (Claire's Brief at 13) is the definition mandated by Section 110(5)'s statutory language, espoused by every prior decision, and confirmed by the legislative history.

According to the statute, a "further transmission" occurs when a communication of a performance is sent beyond the place where it is initially received. 17 U.S.C. § 101; *see also* BMI's Petition at 18-19. Every prior decision addressing the matter holds that a further transmission occurs when a radio broadcast is received in one room and then transmitted to another room. *Bill Miller's Bar-B-Q Enterprises, Inc.*, 688 F. Supp. at 1176; *Gnossos Music v. DiPompo*, 13 U.S.P.Q.2d 1539, 1542 (D. Maine 1989); *International Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652, 657, *aff'd*, 855 F.2d 375, 378 (7th Cir. 1988). The legislative history confirms this definition in its statement that the Section 110(5) exemption does not apply where a broadcast is "further transmitted beyond the place where the receiving apparatus is located." H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 87, *reprinted in*, 1976 U.S.C.C.A.N. 5659, 5701.

Some courts have adopted an even broader interpretation, *i.e.*, *any* dispersal of a radio broadcast through a commercial establishment constitutes further transmission. *Sailor Music*, 516 F. Supp. at 925, *aff'd per curiam*, 668 F.2d 84; *Hickory Grove Music v. Andrews*, 749 F. Supp. 1031, 1038 (D. Mont. 1990); *Hampshire House Publishing Corp. v. Sal & Sam's Restaurant, Inc.*, 1985 WL 9451 (E.D. La. 1985); *U.S. Songs, Inc. v. Downside Lenox, Inc.*, 771 F. Supp. 1220, 1227 (N.D. Ga. 1991); *see also* BMI's Petition at 20-21 for a discussion of these cases.

Claire's tries to bolster the Seventh Circuit's radical departure from the well-settled definition by arguing that the Sev-

enth Circuit adopted Claire's definition, *i.e.*, that further transmission occurs upon "funneling radio broadcasts from one location to a number of different locations by means of numerous speakers."[3] Claire's Brief at 13. The Seventh Circuit not only failed to adopt Claire's unprecedented definition, it never even mentioned it. Rather, the Seventh Circuit said that further transmission requires "the use of some device or process that expands the normal limits of the receiver's capabilities." App. 24a. In so doing, the Seventh Circuit created its own definition contrary to precedent and the accepted meaning of that phrase.

Finally, even Claire's admits that the Seventh Circuit's definition merges the home-type and the further transmission requirements. Claire's Brief at 13-14. Under the Seventh Circuit's definition, every receiving apparatus that further transmits also automatically fails the home-type requirement. If one can "further transmit" only by technically enhancing a home-type receiver, that receiver will no longer be "home-type." Therefore, the Seventh Circuit's definition eliminates the further transmission prohibition.

IV. FAILURE TO GRANT A WRIT OF CERTIORARI WILL ADVERSELY AFFECT MANY SONGWRITERS AND PUBLISHERS.

If the Seventh Circuit's decision goes unreviewed, many songwriters and music publishers will be harmed. The Copyright Act, previously uniform and predictable, will apply differently depending upon the Circuit in which the infringing activities occur, and the remuneration that songwriters and publishers receive for their creativity will decrease.

Who will instead benefit will be the multimillion dollar chain store operations that exploit music for commercial benefit without compensating the creators of that music. When Congress sought to balance the public good with the

[3] This contention that "to further transmit" means sending a broadcast from one room to several rooms, is not supported by any precedent, legislative history, or the statute itself.

right of copyright owners to be paid for their music when performed on the radio in a commercial establishment, it focused upon the mom-and-pop store where the proprietor merely turned on a simple radio, at least in part for his own enjoyment. From this justified narrow exemption, judicially recognized for over a decade, the Seventh Circuit has fashioned an interpretation that allows national chain operations to use massive amounts of copyrighted music for their commercial purposes. In its decision, the Seventh Circuit breaks the Congressional balance apart. That result is not what the Section 110(5) exemption provides.

CONCLUSION

For the foregoing reasons, and for those stated in BMI's Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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